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No. 88-1485

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

H.C. ELLIOTT, INC.,
Petitioner,
v.
CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, a pension trust,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

VICTOR J. VAN BOURG
ROBERT M. HIRSCH
Counsel of Record
MICHAEL B. ROGER
VAN BOURG, WEINBERG, ROGER & ROSENFELD
875 Battery Street, Third Floor
San Francisco, CA 94111
Telephone: (415) 864-4000

STANTON, KAY & WATSON
180 Sutter Street, Third Floor
San Francisco, CA 94108-4799
Telephone: (415) 788-3496
Attorneys for Respondent Carpenters Pension Trust Fund for Northern California

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The sole question presented is:

Whether a housing contractor, which had previously been obligated to make pension contributions for any delinquent carpentry subcontractors, must pay withdrawal liability pursuant to Section 4203(b)(2) of ERISA, as amended, 29 U.S.C. Section 1383(b)(2), after it ceased having an obligation to contribute to a multiemployer pension plan and continued to perform work, of the type for which contributions had been required, through subcontractors.

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 808 (9th Cir. 1988) and is contained in Appendix B attached to the Petition for a Writ of Certiorari. The Order of the United States District Court for the Northern District of California is reported at 663 F. Supp. 1016 (N.D. Cal. 1987) and appears as Appendix A to the Petition.

JURISDICTION

Respondent accepts Petitioner's statement of the Court's jurisdiction.

STATUTES INVOLVED

Respondent accepts Petitioner's statement of the statutes involved.

STATEMENT OF THE CASE

Prior to 1983, H.C. Elliott, Inc. (hereinafter "Elliott" or "the Company"), a California housing contractor, was party to a collective bargaining agreement with the Carpenters 46 Northern California Counties Conference Board (hereinafter "Carpenters") requiring fringe benefit contributions to the Carpenters Pension Trust Fund for Northern California (hereinafter "Pension Fund" or "Pension Plan"), a multiemployer pension plan. Elliott terminated its collective bargaining agreement and reached impasse in negotiations with the Carpenters in December 1983, thereby ceasing to have any further obligation to contribute to the Pension Fund.

Although Elliott hired employees directly for several years to perform carpentry work on its construction projects, the company claims that since November 1982, more than one year before withdrawing from the Pension Fund, it performed all carpentry work through independent subcontractors.[1]

The applicable collective bargaining agreement required that signatory employers subcontract covered work only to subcontractors who agreed to adhere to the Carpenters labor agreement. It required, further, that the signatory employer, if he chose to subcontract any carpentry work, remain primarily liable for contributions to the Pension Fund in the event the subcontractor failed to make such contributions.

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[1] Evidence introduced by the Pension Fund reveals that the Company continued to employ "assistant superintendents" and "warranty workers" who performed work previously covered by the bargaining agreement.

Subsequent to terminating its pension contribution obligation, the Company has hired both Union and non-Union carpentry subcontractors, shifting towards the non-Union subcontractors with the passage of time.

The Pension Fund assessed withdrawal liability against the construction company in 1984 and Elliott countered with the underlying lawsuit, refusing to make any withdrawal liability payments. Both the District Court and the Ninth Circuit Court of Appeals ruled in favor of the Pension Fund, concluding that Elliott continued to perform work which had previously been covered by the applicable collective bargaining agreement and for which pension contributions had been required.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT DECISION COMPORTS WITH THE PURPOSES AND POLICIES OF THE WITHDRAWAL LIABILITY PROVISIONS OF ERISA, AS AMENDED, AND DOES NOT RAISE NOVEL ISSUES REQUIRING SUPREME COURT REVIEW

Elliott would have this Court sanction the Company's withdrawal from the Carpenter Pension Plan, shifting Elliott's share of the unfunded, vested liability, calculated as a function of Elliott's years of participation as a contributing employer in the Plan, to the remaining employer-contributors.

In 1980, Congress, relying substantially upon the Pension Benefit Guaranty Corporation (hereinafter "PBGC") Mulitemployer Study of 1978, enacted the Multiemployer Pension Plan Amendments Act (hereinafter "MPPAA") in an effort to address situations similar or identical to the one raised in this case. *Connolly v. PBGC*, 475 U.S. 211, 217 (1986). Of particular concern to Congress was the need to discourage voluntary withdrawals by employers which both reduced the Plan's contribution base and

shifted the withdrawing employer's share of unfunded, vested liability to the remaining employers. *Id.* at 215-217 (quoting, Pension Plan Termination Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong. 2d Sess. 22 (1978)) ("1978 Hearings)".

Through the use of a subcontracting subterfuge, Elliott now seeks to accomplish precisely what Congress sought to thwart with the 1980 withdrawal liability amendments to ERISA. Were Elliott permitted to withdraw as a contributing employer from the Carpenters Pension Fund without paying withdrawal liability, its prorata share of the unfunded, vested liability would be redistributed by the Plan to the remaining employers. See Section 4211(b)(4) of ERISA, 29 U.S.C. § 1391(b)(4). Coupled with the lost contribution base occasioned by Elliott's withdrawal (and the lost contributions from Elliott's subcontractors), the Pension Fund would have to turn to the remaining employers for additional revenues.[2] The obvious incentive for all remaining contractors would be to subcontract all carpentry work and withdraw from the Plan as soon as possible. This ". . . vicious downward spiral (might) continue until it (was) no longer reasonable or possible for the Pension Plan to continue." *Connolly* at 215 (quoting the "1978 Hearings"). The Circuit Court below refused to countenance such a strategy.

The Ninth Circuit opinion in *Elliott* is also consistent with the 1985 PBGC Opinion Letter addressing the withdrawal liability/subcontracting issues. Said the PBGC:

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[2] While Elliott suggests 80% of its post-withdrawtl carpentry work was performed by Union subcontractors, its largest carpentry subcontractor withdrew from the Pension Plan less than three years after Elliott did. Moreover, the contributions from any Union subcontractor employed by Elliott after withdrawal were calculated to substantially offset the additional, newly accruing liabilities attributable to the subcontractor's employees.

> "(u)nder these circumstances there is no withdrawal unless the employer would have been obligated to make contributions for work performed by the subcontractors under the terminated agreement. If contributions would not have been required, there would be no withdrawal, because the employer would not be continuing to perform work of the type for which contributions were previously required. PBGC Opinion Ltr. 85-5 (January 30, 1985).

The PBGC Opinion Letter, which is accorded deference by the Courts (see, for example, *U.S. v. Turbett*, 452 U.S. 576, 580 (1981); *Nachman Corp. v. PBGC*, 446 U.S. 359, 371-72 (1980)), underscores the significance of the subcontracting provision of Elliott's collective bargaining agreement, holding the signatory employer primarily liable for any of its subcontractors delinquent pension contributions. Certiorari should not be granted where a circuit court relies so heavily upon the factual particularities of the case.

II. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF ANY OTHER COURTS OF APPEAL

In a well reasoned, yet concise opinion, the Ninth Circuit concluded that H.C. Elliott, Inc. continued to operate as a housing contractor in Northern California, performing carpentry work through its subcontractors; work for which Elliott had previously been obligated to pension contributions.[3] The Circuit Court stated the following:

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[3] Although Elliott frames the Question Presented by asking whether a property owner who hires a contractor may be deemed an employer performing work in the construction industry, nothing in the decision below addresses such an issue nor was it raised by the Petitioner. Instead, the Court determined that Elliott, a housing developer, continued to perform work, albeit through subcontractors, within the jurisdiction of the collective bargaining agreement for which contributions were previously required.

> "The key question here then, as in the District Court, is whether Elliott, after its obligation to contribute under the Plan ceased, continued 'to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required.' It is clear from the collective bargaining agreement to which Elliott was signatory, that Elliott was responsible for payments to the Pension Fund for all work done either by its own employees or by its own subcontractor employees. Elliott was obliged under the terms of the collective bargaining agreement either to contribute on behalf of its own carpenters, to hire Union subcontractors making their own contributions to the Fund, or to make up any delinquencies. Accordingly, we are in full agreement with the district court when it concluded that regardless of whether the carpentry tools were wielded by Elliott's employees or a subcontractors' employees, Elliott continued to do work of the type for which contributions were previously required." 859 F.2d at 813.

No other circuit court has addressed this issue. In fact, the district court below noted that the ". . . case presented novel issues, . . .". See, A-4 to Appendix A to Petition.

Neither circuit court case cited by Elliott as conflicting touches upon the issues here. In *ILGWU National Retirement Fund v. Levy Brothers Frocks*, 846 F.2d 879 (2nd Cir. 1988) the Court acknowledge the following:

> "The key issue on appeal is whether the corporation (appellee) is precluded from challenging the Fund's determination of withdrawal liability because the corporation did not seek to arbitrate the question." *Id.* at 884.

The Court in *Levy Brothers Frocks*, noting that the corporation's former employees were covered by the Fund, held that the corporation had an obligation to

arbitrate the withdrawal liability dispute notwithstanding the fact that the liability claim included calculations based upon a predecessor's contributions. The decision is actually consistent with the *Elliott* decision of the Ninth Circuit Court since the corporation was deemed an employer by virtue of its prior, pre-withdrawal, relationship to its employees and the Fund.[4]

The issue in *Union Asphalt and Road Oils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988) was whether the employer, which distributed asphalt and road materials, operated within the "building and construction industry" thereby falling within the purview of Section 4203(b) of ERISA, as amended. 29 U.S.C. § 1383(b). The Court found the employer to be outside the construction industry but was not asked to address issues raised in our case. Neither the *Levy Brothers Frocks* decision nor the *Mo-Kan* decision present the type of direct conflict between the circuits justifying a grant of certiorari. See, for example, *Marks v. U.S.*, 430 U.S. 188, 189 fn.1 (1977); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976).

CONCLUSION

The Ninth Circuit decision below comports with the legislative intent behind the 1980 Withdrawal Liability Amendments to ERISA. It is consistent with the PBGC pronouncement on point and conflicts with no courts of

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[4] Elliott now insists upon characterizing the Ninth Circuit decision below as one which incorrectly holds Elliott to be the employer of its subcontractor's employees. The Ninth Circuit made no such holding. Rather, it concluded, as did the Court in *Levy Brothers Frocks*, that the subject company was the direct employer of employees for whom contributions were made while the collective bargaining agreement was in effect. *H.C. Elliott* at 812-13; *Levy Brothers Frocks* at 885.

appeals decisions. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR J. VAN BOURG
ROBERT M. HIRSCH
Counsel of Record
MICHAEL B. ROGER
VAN BOURG, WEINBERG, ROGER
& ROSENFELD
875 Battery Street, Third Floor
San Francisco, CA 94111
Telephone: (415) 864-4000

STANTON, KAY & WATSON
180 Sutter Street, Third Floor
San Francisco, CA 94108-4799
Telephone: (415) 788-3496
Attorneys for Respondent
Carpenters Pension Trust
Fund for Northern California

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